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W. Scott Barrett; Attorney for Appellant;

L. Brent Hoggan; Attorney for Appellee;

Recommended Citation

Brief of Appellant, *Wright Development, Inc. v. City of Wellsville*, No. 16531 (Utah Supreme Court, 1979).
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IN THE SUPREME COURT OF THE STATE OF UTAH

WRIGHT DEVELOPMENT, INC.
a corporation,

Plaintiff and
Appellant

vs.

THE CITY OF WELLSVILLE,
a municipal corporation,

Defendant and
Appellee.

Civil No. 16531

APPELLANT'S BRIEF

Appeal from an Order Dismissing Plaintiff's Action and
Refusing Declaratory Relief
In the District Court of the First Judicial District
In and For Cache County, Utah
The Honorable VeNoy Christoffersen, Judge

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ATTORNEY FOR APPELLANT

FILED

AUG 13 1979

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a corporation,	:	
	:	
Plaintiff and	:	
Appellant	:	
	:	
vs.	:	Civil No. 16531
	:	
THE CITY OF WELLSVILLE,	:	
a municipal corporation,	:	
	:	
Defendant and	:	
Appellee.	:	

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE CITY OF WELLSVILLE,	:	
a municipal corporation,	:	
	:	
Defendant and	:	
Appellee.	:	

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action brought by Wright Development, Inc., for Mandamus and Declaratory Relief against the City of Wellsville concerning Wellsville's refusal to approve a Final Subdivision Plat. The Complaint was filed on December 21, 1978 and an Amended Complaint stating a claim for Declaratory Relief was thereafter filed. The City of Wellsville answered the Complaint and the Amended Complaint generally denying Plaintiff's allegations.

DISPOSITION IN LOWER COURT

The Trial Court, the Honorable VeNoy Christoffersen, District Judge, heard the Plaintiff's case on the 2nd day of March, 1979. Defendant presented no evidence but Moved to Dismiss the Plaintiff's action (TR 40). The Court thereupon took the Motion under advisement (TR 49) and asked the parties to submit Memoranda of Law on the Motion to Dismiss.

Without taking any further evidence, the Court rendered its Decision on April 2, 1979. The Decision granted the Motion to Dismiss on the sole ground that the Defendant's action in refusing to consider or approve the final plat was discretionary. The Court did not consider or rule on Plaintiff's Request for Declaratory Relief.

RELIEF SOUGHT ON APPEAL

Appellant requests that the Court reverse the Order of the lower court dismissing Appellant's action and that the relief prayed for by Appellant be granted or that the matter be remanded for further proceedings including a decision on Appellant's Request for Declaratory Relief.

STATEMENT OF FACTS

Over three years ago the Plaintiff, through Robert Wright, its President, traded certain real property with the understanding that the property he received would be annexed into the City of Wellsville and zoned for subdivision development. (TR 6-7) The property was annexed by Wellsville and zoned for single family subdivision development. Thereafter, a Preliminary Plat was prepared and approved by the City of Wellsville (TR 7). Conditions for the approval were set forth in a letter signed by the City Engineer, dated 23 September 1977 (PL. EX. 2) (TR 8-9).

Between the time the Preliminary Plat was approved and a Final Plat was submitted to the City for a twenty-one (21) lot partial subdivision, Valley Engineering Company, which had represented the Plaintiff, accepted employment as the Wellsville City Engineer and told Plaintiff it could no longer represent the Plaintiff's interests (TR 14).

It appeared from the evidence presented at the trial that the primary reason for the City Council of the Defendant refusing to approve the Final Plat as submitted was that the City Council required a substantial change from the Preliminary Plat. The Preliminary Plat provided for a Six Inch (6") water line to the nearest city water main. However, the City Council, as a condition for approval of the Final

Plat, attempted to impose an obligation on the part of the Plaintiff to construct an Eight Inch (8") water line One and One-Half (1.5) Miles from the subdivision. This would cost approximately Eighty Thousand Dollars (\$80,000.00) (TR 14-15). In addition to that, the City would charge the developer Seven Hundred Fifty Dollars (\$750.00) for each hook-up to the water line it was trying to require the developer to install at his own expense, and would permit hook-ups outside the subdivision to other users with no credit or benefit to the developer.

After approval of the Preliminary Plat, Plaintiff's representatives appeared before the Defendant City Council numerous times trying to get a Final Plat approved (TR 29-30). During those conferences, the only objection the Defendant City Council made to the approval of the Final Plat was the provision for supplying city water. Rather than the 6" line to the nearest city water main, as provided in the Preliminary Plat, the City Council insisted on an 8" line running 1.5 miles to be installed entirely at the developer's expense (TR 30-31).

Numerous other minor objections to the Final Plat were raised for the first time by Defendant's counsel at the trial, such as waste water, access, title to the property, etc. However, there is no evidence whatsoever that any of

these minor items were material or prevented in any way the City's approval of the Final Plat. The 8" water line was the basic condition City wanted (TR 30). It further appeared that Plaintiff agreed to comply with all Defendant's requirements except the 8" water line (TR 14, 15).

The mayor of the Defendant City admitted that the basic reason for failure to approve the Final Plat was disagreement on the 8" water line and who should pay for it (TR 37). This new requirement was recommended by Valley Engineering who had, after the approval of the Preliminary Plat, which they prepared, changed their employment from the developer to the City (TR 37-38).

STATEMENT OF POINTS

I

SINCE THE PLAINTIFF'S ACTION WAS DISMISSED AT THE CONCLUSION OF PLAINTIFF'S PRESENTATION OF EVIDENCE, ALL OF THE FACTS MUST BE INTERPRETED IN THE LIGHT MOST FAVORABLE TO PLAINTIFF.

II

APPROVAL OF A FINAL PLAT IS A MINISTERIAL ACT AND THE COURT ERRED IN RULING THAT DEFENDANT CITY COULD IMPOSE NEW AND ADDITIONAL CONDITIONS AS A MATTER OF DISCRETION AFTER APPROVAL OF A PRELIMINARY PLAT.

III

PLAINTIFF IS ENTITLED TO A JUDGMENT OF DECLARATORY RELIEF DETERMINING WHETHER OR NOT IS IS UNREASONABLE AND ARBITRARY FOR DEFENDANT TO REQUIRE, AS A CONDITION OF FINAL PLAT APPROVAL, AN 8" WATER LINE COMMENCING 1.5 MILES FROM THE SUBDIVISION PROPERTY ENTIRELY AT PLAINTIFF-DEVELOPER'S EXPENSE.

IV

THE COURT ERRED IN MAKING FINDINGS OF FACT MUCH BROADER THAN THE EVIDENCE SUPPORTED AND ERRED IN FAILING TO AMEND SAID FINDINGS AFTER OBJECTIONS BY THE PLAINTIFF.

V

CONCLUSIONS

ARGUMENT

I

SINCE THE PLAINTIFF'S ACTION WAS DISMISSED AT THE CONCLUSION OF PLAINTIFF'S PRESENTATION OF EVIDENCE, ALL OF THE FACTS MUST BE INTERPRETED IN THE LIGHT MOST FAVORABLE TO PLAINTIFF.

The Court's Dismissal of the Plaintiff's action pursuant to Rule 41(b) is equivalent to a non-suit. The general rule for such a dismissal is that a motion for a non-suit admits the truth of the evidence and every inference of fact that can be legitimately drawn therefrom which is favorable to the Plaintiff. 75 AM JUR 2d 471. It has been further stated that "the evidence on behalf of the Plaintiff must be accepted as true and all conflicts and testimony must be resolved in his favor; the evidence must be interpreted most favorably to him and most strongly against the Defendant. Indeed, the Defendant's evidence may not be considered except insofar as it tends to clarify or explain the evidence of the Plaintiff." 75 AM JUR 2d 473.

A review of Plaintiff's evidence clearly establishes that the sole reason, which had any weight at all, for the refusal of the Defendant to approve the Plaintiff's Final Plat was the insistence by the Defendant that Plaintiff install an

off-site water line beginning 1.5 miles from the subdivision at Plaintiff's expense. No evidence was presented on behalf of Defendant to show that such a water line was reasonable or necessary. Nor was any law submitted by Defendant's counsel to support Defendant's contention that such off-site improvements could be required under state law as a condition of final plat approval.

The Defendant mayor admitted that the Planning and Zoning Commission had approved the Preliminary Plat and that they had also approved the Final Plat (TR 38). The mayor also admitted that the condition the Council wanted, that was the stumbling block, was the 8" line (TR 37). There is no evidence, except arguments of Defendant's counsel, that anything at all was in dispute other than the 8" line.

II

APPROVAL OF A FINAL PLAT IS A MINISTERIAL ACT AND THE COURT ERRED IN RULING THAT DEFENDANT CITY COULD IMPOSE NEW AND ADDITIONAL CONDITIONS AS A MATTER OF DISCRETION AFTER APPROVAL OF A PRELIMINARY PLAT.

As a general rule, it has been held that, if a subdivider complies with all of the requirements of the valid subdivision control laws, regulations, and ordinances, approval of

the final plat becomes a ministerial act and the plat may not be disapproved and especially not for reasons which have nothing to do with the intent and purpose of subdivision control. 82 AM JUR 2d 670. Where a developer complies with the zoning ordinance, the act of approving a plat is ministerial and can be enforced by mandamus. J.C. Penney's Properties vs. Oak Lawn, 38 ILL APP . 3d 1016, 349 N.E. 2d 637 (1976)

It has been said that "the intermediate step of submission of a preliminary plan usually is a local innovation authorized by ordinance, but not specifically mentioned in the enabling legislation. Anderson, American Law of Zoning §23.13 This is true in Utah. However, whenever such procedure is adopted, it constitutes a delegation of the preliminary plat approval to the planning and zoning board. This has been done in Wellsville. "Where a preliminary plan has been approved, approval of the final plat has been described as a ministerial act" Greenlawn Memorial Park vs. Neenah Town Board of Supervisors, 270 WIS. 378, 71 N.W. 2d, 403 (1955) Anderson, American Law of Zoning §23.13 "Where a planning board has given final approval to a plat, such approval may not be rescinded without new evidence and an additional hearing after notice". Connecticut River Estates Inc. vs. Luchsinger 276 NYS 2d 389 (1967)

Since a subdivider is entitled to know the extent of his obligations at a reasonable stage in the proceedings, conditions mandated by the reviewing agency may not be changed after tentative preliminary plat approval. *Leven vs. Livingston Township*, 35 NJ 500, 173 A 2d 391 (1961) Anderson, American Law of Zoning §23.24.

III

PLAINTIFF IS ENTITLED TO A JUDGMENT OF DECLARATORY RELIEF DETERMINING WHETHER OR NOT IT IS UNREASONABLE AND ARBITRARY FOR DEFENDANT TO REQUIRE, AS A CONDITION OF FINAL PLAT APPROVAL, AN 8" WATER LINE COMMENCING 1.5 MILES FROM THE SUBDIVISION PROPERTY ENTIRELY AT PLAINTIFF-DEVELOPER'S EXPENSE.

Conditions which require the subdivider to improve land outside the plat in issue, or to contribute to the improvement of such land, have been disapproved. While a developer may be required to improve a street or highway shown on the plat submitted for approval, he may not be required to improve a street or highway which is not shown on such a plata subdivider may not be required to improve streets outside the subdivision as a condition of plat approval. Anderson, American Law of Zoning §23.36.

Subdivision enabling acts commonly authorize municipalities to require a subdivider to equip his subdivision with a drainage system, sanitary sewers, and water mains....The capital outlay involved in the installation of water mains, sewers, and drainage systems is so great that developers frequently have raised legal issues relating to the exaction of fees, the reasonableness of specific requirements, and even the authority of a particular municipality to require a developer to absorb the costs of such improvements. Anderson, American Law of Zoning §23.43. A new Jersey Court held unreasonable a requirement that water mains be extended along an entire street to serve scattered lots without regard to the benefit conferred. *Lake Intervale Homes vs. Troy Hills*, 28 NJ 423, 147 A 2d 28 (1958). Disapproval of a plat for failure to provide adequate facilities is not justified where the lack is in the water available to the site and not in the size or location of the pipes installed by the subdivider. Anderson, American Law of Zoning, §23.43; *Dailey Construction vs. Planning Board of Randolph*, 340 MASS, 149, 163 N.E. 2d 27 (1959). A subdivider cannot be required to construct a drainage system after a plat has been approved without such a system.

There are numerous cases holding that a developer may not be required to improve streets or highways which are not shown on the subdivision plat. Anderson, American Law of Zoning, §23.36. In that same section, it is further stated: "A subdivider may be required, as a condition of plat approval, to provide access to a subdivision from the north even though he had not planned to provide such access. However, he cannot be required to bear one-half of the expense of a culvert to be constructed outside the subdivision but on such access route. A subdivider may not be required to improve streets outside the subdivision as condition of plat approval."

In Pearson - Kent Corporation vs. Bear, 315 NYS 2d 226, the Court held that subdivision plats submitted for approval were improperly disapproved on the ground that three roads which provided access to the property were outside the property and inadequate. There is no statutory provision empowering a town to require improvements on streets outside a subdivision map at the time a subdivision plat is submitted for approval. Anderson, American Law of Zoning, §23.36

Defendant's contention that it can require off-site improvements at the expense of the developer appears to be based

on §25 of its ordinance which provides, in part, that anyone within the City desiring to have water or sewer mains extended for their use must bear the entire expense. It is submitted that this ordinance is invalid and unenforceable and that the Court's decision should have included an answer to Plaintiff's Prayer for Declaratory Relief as to whether this ordinance is, in fact, valid. The decision helps the developer not at all and completely blocks developer's use of the land unless developer complies with every demand of the Defendant City, whether valid or not.

IV

THE COURT ERRED IN MAKING FINDINGS OF FACT MUCH BROADER THAN THE EVIDENCE SUPPORTED AND ERRED IN FAILING TO AMEND SAID FINDINGS AFTER OBJECTIONS BY THE PLAINTIFF.

The Court's Decision was only two pages long and, in substance, it only holds that the Court considers approval of the final plat a discretionary matter for the judgment of the community authorities with which the Court will not interfere.

Based on that opinion, Defense counsel prepared Findings of Fact and Conclusions of Law which greatly expanded on the Court's opinion and recited in its Findings of Fact matters which were not proved and Conclusions of Law which were not really considered by the Court. For example, Finding number 12 says: "Said letter of September 23, 1977 has not been accepted by Defendant". The only evidence is that said letter, written by the City Engineer, was attached to the Preliminary Plat at the request of the Panning Commission which had previously approved the Plat (TR 25-26).

The Court further found, as a Fact, that the "Defendant had, in effect, validly enacted subdivision and water ordinances". Part of Plaintiff's contentions are that the applicable ordinances are not all valid. The Court, in its opinion, said nothing about whether or not the city ordinances were valid and enforceable. Other objections are set forth in Plaintiff's Objections to Findings of Fact and Conclusions of Law on file in the record.

V

CONCLUSION

It is well recognized that the formalizing of procedure for plat review by municipalities has had a heavy impact upon the right to develop land. The effect of subdivision

control on rights in land is as direct and formidable as that of zoning regulations. The owner of land which must be subdivided before it is developed can be stopped in his tracks by a recalcitrant reviewing agency. Anderson, American Law of Zoning, §23.10.

The Utah Enabling Act does not set any time limit on approval of either final or preliminary plats. This enables a municipality to cause interminable delay. This case is a good example of such a delay which, in effect, has completely blocked the development of Plaintiff's subdivision for the time being.

The Court could have been of great assistance in resolving a dispute between the Plaintiff and Defendant by simply making a definitive Order for Declaratory Relief stating whether or not the Defendant could compel Plaintiff, pursuant to valid ordinances, to make extensive off-site improvements by way of an 8" water line commencing 1.5 miles from the subdivision. The Court's decision in dismissing the Plaintiff's action establishes no guidelines whatsoever but, on the other hand, appears to hold that no developer has any rights in Court since substantially everything a city council does is discretionary.

It is submitted that this is not the law and it is

respectfully requested that the Order of the trial court
should be reversed.

DATED this 9th day of August, 1979.

A handwritten signature in cursive script, reading "W. Scott Barrett". The signature is written in dark ink and is positioned above a horizontal line.

W. Scott Barrett
Attorney for Plaintiff
and Appellant